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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ESTEVAN ALVARADO-HERRERA, an)	Case No.: 2:22-cv-00438-CDS-NJK
individual,)	
)	DEFENDANT ACUITY A
Plaintiff,)	MUTUAL INSURANCE
)	COMPANY'S MOTION TO
vs.)	COMPEL RULE 35
)	EXAMINATION OF PLAINTIFF
ACUITY A MUTUAL INSURANCE)	AND PRODUCTION OF RAW
COMPANY, a Wisconsin corporation; and)	DATA FROM PRIOR
DOES I through XX, inclusive,)	EXAMINATION
)	
Defendants.)	

Defendant Acuity A Mutual Insurance Company, by and through its attorneys of record, David J. Feldman, Esq. and Rachel J. Holzer, Esq. of the Feldman Firm, respectfully submits this motion to compel the Federal Rule of Civil Procedure ("Rule") 35 examination of Plaintiff Estevan Alvarado-Herrera and the production of the raw data from the Rule 35 examination Alvarado's vocational rehabilitation expert performed.

This Motion is made and based on the papers and pleadings on file herein, the following Memorandum of Points and Authorities, the attached exhibits, including counsel's declaration pursuant to Local Rule 26-6(c) (**Exhibit A**), and any oral argument this Court may entertain at the

time of hearing this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This breach of contract and insurance bad faith case stems from a January 30, 2017 vehicular accident that Plaintiff Estevan Alvarado-Herrera claims caused him to injure his back and left knee. Mr. Alvarado claims that, as a result of the subject accident, he incurred current and future medical special damages of nearly **\$2,500,000.00**, as well as \$120,000.00 in current lost wages and \$369,728.00 in future lost earning capacity. Mr. Alvarado's claimed injuries in this case were also the subject of the underlying personal injury action that Mr. Alvarado commenced against the tortfeasors, which resulted in him receiving nearly \$2,000,000.00 in liability policy benefits from the tortfeasors' insurers.

This case is complicated by a roll-over accident Mr. Alvarado was involved in only 10 days before the subject accident, his history of past motor vehicle accidents, and the degenerative condition of his back and left knee. Accordingly, significant discovery must be conducted regarding Mr. Alvarado's past injuries and accidents, his physical condition pre-dating the subject accident, and, most relevant to this Motion, his ability to work in the future.

Unfortunately, discovery in this case continues to be stalled by Alvarado's bad faith litigation conduct.¹ Although Alvarado claims his medical treatment is ongoing and his underlying personal injury case was resolved more than a year ago, according to Alvarado, Acuity is bound and limited by the discovery it did or did not do in that case against the tortfeasors. Specific to this Motion, Alvarado asserts Acuity not having requested a Rule 35 examination of Alvarado by a vocational rehabilitation expert in the underlying case (in which Acuity intervened but no claims were brought against Acuity) forecloses Acuity's ability to conduct this discovery in this case.

¹ Alvarado has refused to take part in discovery since it commenced. He first refused to answer written discovery requests on the grounds he provided the same information during the claims handling process and/or in the underlying case. His refusal to provide discovery responses was the subject of a prior motion to compel (ECF No. 18.) It was not until after the motion to compel was filed that Alvarado agreed to provide supplemental discovery responses.

1 Alvarado also disputes that he placed his injuries and his ability to work in issue in this case,
 2 despite his Complaint stating that he seeks \$7 million in damages for his bodily injuries, which have
 3 impacted his ability to work and will continue to do so in the future (ECF No. 1-2, Pl.'s Compl.,
 4 at ¶ 10, 3:17-26), and despite his disclosure of damages *in this case* that include \$120,000.00 in past
 5 lost wages and \$369,728.00 in future lost earning capacity (**Exhibit B**, Pl.'s Init.'l Discls., at 22:12-
 6 16).

7 Alvarado's contention is belied by Rule 35 and the well established case law regarding its
 8 application. *See, e.g., Victor v. Walmart, Inc.*, No. 220CV01591JCMNJK, 2021 WL 3745190, at
 9 *4 (D. Nev. Apr. 8, 2021)(Mag. N. Koppe)(finding plaintiff put her physical injury in controversy
 10 by suing upon thereby providing defendant with good cause for a Rule 35 examination)(quoting
 11 *Schlagenhauf v. Holder*, 379 U.S. 104, 119, 85 S. Ct. 234, 243 (1964)(pleadings alone may be
 12 sufficient to provide good cause for a Rule 35 examination where the plaintiff places her injury in
 13 controversy); *Buononato v. Sam's W., Inc.*, No. 219CV01221RFBNJK, 2020 WL 10147129, at *2
 14 (D. Nev. Nov. 18, 2020)(Mag. N. Koppe)(same); *Painter v. Atwood*, No. 2:12-CV-01215-JCM,
 15 2013 WL 5428059, at *2 (D. Nev. Sept. 26, 2013)(granting defendant's motion to compel
 16 psychological examination because "Defendants have the right to perform their own assessment,
 17 because one of the purposes of Rule 35 is to level the playing field in cases where physical or
 18 mental condition is at issue, because '[a] plaintiff has ample opportunity for psychiatric or mental
 19 examination by his/her own practitioner or forensic expert.'")(internal quotation omitted).
 20 Accordingly, Acuity respectfully requests this Court's assistance in obtaining a Rule 35 examination
 21 of Mr. Alvarado, including an interview with Acuity's retained vocational rehabilitation expert and
 22 potentially some testing to follow, which will not likely exceed two hours. Acuity also requests this
 23 Court order Alvarado's vocational rehabilitation expert, Carol Hyland, to transmit to Acuity's
 24 expert, Robert Taylor, the raw data from the administration of the vocational testing she
 25 administered so that Mr. Taylor may interpret the data himself and assess Ms. Hyland's
 26 methodology as it relates to her conclusions.
 27

28 Additionally, it must be clarified that Alvarado did not take issue with the expert Acuity

1 retained to perform the interview and testing or with the parameters of the interview or the test.
 2 Rather, Alvarado contends Acuity is barred from this discovery because Acuity did not request such
 3 discovery in the underlying case.

4 **II. RELEVANT FACTUAL AND PROCEDURAL HISTORY**

5 **A. General Facts Regarding This Litigation**

6 Alvarado brings this insurance bad faith case against Acuity, the insurer that issued a
 7 commercial automotive policy to Alvarado's former employer Sierra Air Conditioning. Alvarado
 8 alleges that on January 30, 2017, he was injured while at work, when he was retrieving some items
 9 from a transit van and the non-party tortfeasor turned his truck and trailer too tightly, coming into
 10 contact with door of the transit van and causing it to close on Alvarado's body. Alvarado made
 11 claims to Sierra Air's workers compensation carrier, the tortfeasor's insurance carrier, and he
 12 notified Acuity that he may have a claim for underinsured motorist ("UIM") benefits under Sierra
 13 Air's commercial auto policy.

14 On January 14, 2019, Alvarado sued the tortfeasors and his employer for the injuries
 15 Alvarado suffered in Eighth Judicial District Court, Case No. A-19-787456-C (the "underlying
 16 case"). Acuity intervened in the underlying case to monitor it, as, in Nevada, a lack of intervention
 17 could result in Acuity being bound by a default judgment against one of the named defendants. *Est.*
 18 *of Lomastro ex rel. Lomastro v. Am. Fam. Ins. Grp.*, 124 Nev. 1060, 1067, 195 P.3d 339, 344
 19 (2008) ("In Nevada, an insurance company 'is bound by the result of an action between its insured
 20 and an uninsured motorist when the carrier has notice of the action but elects not to
 21 intervene.'")(quoting *State Farm Mut. Auto. Ins. v. Wharton*, 88 Nev. 183, 187 n. 7, 495 P.2d 359,
 22 362 n. 7 (1972) (citing *State Farm Mut. Auto. v. Christensen*, 88 Nev. 160, 494 P.2d 552 (1972)).

24 During the underlying case, Alvarado's prior vehicular accidents came to light, including
 25 a roll-over accident that occurred just 10 days before the subject accident, for which Alvarado
 26 sought emergency treatment. Alvarado's claimed injuries were also called into question by defense
 27 experts and by his own workers compensation doctor, who believes this is a case of medical
 28 buildup. Alvarado's films support this conclusion. Although Acuity joined in the tortfeasors'

1 retention of an orthopedic/neurosurgeon expert, Dr. Jeffrey Wang, Acuity did not engage in
 2 substantial discovery or retain a vocational rehabilitation expert, as there were no claims against
 3 Acuity and it was solely intervening to protect its interests.

4 Ultimately, the tortfeasors settled with Alvarado, who received nearly \$2,000,000.00 from
 5 the tortfeasors' insurers. Acuity withdrew its intervention, and the underlying case was dismissed.

6 On February 8, 2022, Alvarado filed suit against Acuity in the Eighth Judicial District
 7 Court, asserting claims for: 1) Breach of Contract (seeking UIM benefits under the Policy); (2)
 8 Unfair Insurance Practices (for violations of NRS 687B.145(2) and NRS 686A.310); and (3)
 9 Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing ("Bad Faith"). Acuity
 10 subsequently removed the case to this Court based on diversity jurisdiction.

11 Plaintiff's Complaint places his physical health and ability to work in controversy by
 12 alleging:

13 As a direct and proximate result of the Accident, Plaintiff suffered significant bodily
 14 injuries, including several severe physical injuries, proximately causing past and
 15 future general and special damages, including but not limited to: pain and suffering;
 16 emotional anxiety and distress; loss of enjoyment of life; medical treatment,
 17 including invasive surgical procedures and associated medical expenses; the need
 18 for future medical treatment, including invasive surgical procedures and associated
 19 medical expenses; **past lost wages, loss of future earnings and earning capacity**;
 20 loss of household services; and other incident expenses and damages; with said past
 21 and future general and special damages in an amount in excess of SEVEN
 22 MILLION DOLLARS (\$7,000,000.00).

19 (ECF No. 1-2, Pl.'s Compl., at ¶ 10, 3:17-26 (bold emphasis added).)

20 These damages also form the bases of Alvarado's contractual and extra-contractual claims. (*Id.*, at
 21 ¶¶ 15, 101-103, 123.)

22 On March 18, 2022, Alvarado served Acuity his Initial Disclosure pursuant to Rule 26(a)(1),
 23 Rule 26(a)(3), and Local Rule 26-1, which disclosed his damages, including:

- 24 1. \$494,254.07 in past medical special damages;
- 25 2. \$1,469,434.00 in future medical special damages;
- 26 3. \$120,000 in past lost wages; and
- 27 4. \$369,728.00 in future lost earning capacity.
- 28

1 (Exhibit B, Pl.’s Init.’l Discls., at 21-22.)

2 Alvarado’s disclosures also clarified that: “Plaintiff intends to seek damages for future
3 vocational rehabilitation or retraining, at an amount to be determined during the course of discovery
4 and to be supplemented at a later date, or at the time of trial.” (*Id.*, at 22:17-19.) To that end,
5 Alvarado’s disclosure included a report prepared by his designated vocational rehabilitation expert,
6 Carol Hyland (Exhibit C).

7 **B. Facts Regarding this Discovery Dispute**

8 Since discovery commenced, Alvarado has taken the position that Acuity is not entitled to
9 conduct any discovery in this case because: (1) Alvarado provided all the sought after documents
10 and information Acuity requested in the underlying case or during the claim handling process (*see*,
11 *e.g.*, ECF No. 18-3, Pl.’s Resp. To Interrog. No. 7, at 7:19-8:11) ; and (2) Acuity waived the right
12 to conduct discovery in this case that it did not pursue in the underlying case against the tortfeasors
13 (*see* Exhibit A, Decl. Counsel).

14 As explained in the Declaration of Counsel, the allegations in Alvarado’s Complaint and
15 the damages he enumerated in his Initial Disclosure place Alvarado’s health in controversy. Thus,
16 Acuity requested Alvarado submit to an interview with Acuity’s retained vocational rehabilitation
17 expert, Robert Taylor, and potentially an online test to be administered by Mr. Taylor. Acuity also
18 requested the raw data from the tests Alvarado’s vocational rehabilitation expert, Carol Hyland,
19 administered to him be sent to Mr. Taylor. Alvarado rebuffed these requests. The following is the
20 chronology of the discovery dispute as memorialized in the correspondence between counsel and
21 in the Declaration of Counsel.

22 On August 2, 2022, Acuity’s counsel sent Alvarado’s counsel correspondence requesting
23 an interview with Acuity’s expert, Mr. Taylor, and possible testing, to be conducted on August 16,
24 August 17, or August 23, 2022, with a start time between 9:00 a.m and 10:00 a.m PST. (Exhibit
25 D, Aug. 2, 2022 Corr. D. Feldman to T. Anderson.) The correspondence clarified the interview
26 would take about 2 hours, and, if Mr. Taylor determined vocational testing is necessary, online
27 testing would take place immediately after the interview and would take about 2.5 hours. (*Id.*) The
28

1 correspondence also clarified the interview and testing could take place on another date in August,
2 2022, should Alvarado be unavailable on the dates provided.

3 On August 9, 2022, Plaintiff's counsel responded to Acuity's counsel's correspondence
4 asserting their position that Acuity is not entitled to conduct any discovery that Acuity took part in
5 during the underlying case or that Acuity had the opportunity to conduct in the underlying case, but
6 did not. (**Exhibit E**, Aug. 9, 2022 Corr. S. Jaffe and T. Anderson to D. Feldman and R. Holzer.) As
7 support for counsel's decision declining to allow Alvarado to submit to an interview with Acuity's
8 vocational rehabilitation expert, Alvarado's counsel pointed only to Acuity's March 21, 2021
9 correspondence sent to Alvarado during the claims handling process regarding the additional
10 information Acuity required, as well as statements made by Acuity's counsel at two hearings in the
11 underlying litigation regarding Acuity's decision on Alvarado's claim. (*Id.*, at 1-2.) Finally,
12 Alvarado communicated his refusal to participate in essentially any discovery in this case, as
13 follows:

14
15 To the extent Acuity intends to ask for further similar discovery, such as a Rule
16 35 Examination or a second deposition of Plaintiff, please make those requests
now so that we can have the Court decide this issue at one time, rather than by
piecemeal. We intend to seek requests.

17 (*Id.*, at 3.)

18 Despite Alvarado's asserted intention, he has not filed a motion for protective order.

19 On August 16, 2022, Acuity's counsel responded to Plaintiff's counsel's correspondence
20 "declining" to allow Alvarado to take part in an interview with Acuity's retained vocational
21 rehabilitation expert in this case. (**Exhibit F**, Aug. 16, 2022 Corr. D. Feldman to S. Jaffe and T.
22 Anderson). The correspondence explained that Alvarado has put his health and his capacity to work
23 in issue in this case thereby providing good cause for a Rule 35 examination with a vocational
24 rehabilitation expert and that this Court has counseled that parties are not absolved of their
25 discovery duties because information may have been provided in the underlying case (though in this
26 case no vocational rehabilitation expert examination took place in the underlying case). (*See, id.*)

27 A substantial amount of case law was provided to Alvarado's counsel supporting Acuity's
28

1 position. (*See, id.*, at pp. 2-3.) The correspondence also set a date and time to meet and confer on
2 the subject, August 23, 2022.

3 On August 19, 2022, Acuity's counsel sent follow up correspondence to Alvarado's counsel
4 requesting Alvarado's vocational rehabilitation expert, Carol Hyland, provide the raw testing data
5 from the tests she administered to Alvarado to Acuity's expert, Mr. Taylor. (**Exhibit G**, Aug. 19,
6 2022 Corr. D. Feldman to S. Jaffe and T. Anderson). The correspondence also explained that the
7 production of this data and extending the discovery deadlines would be additional topics of
8 conversation during the August 23, 2022 meet and confer between counsel. (*Id.*)

9 As set forth in the Declaration of Counsel (Exhibit A), on August 23, 2022, counsel took
10 part in a meet and confer regarding the topics above, with Rachel Holzer, Esq. representing Acuity
11 and Steve Jaffe, Esq., Taylor Anderson, Esq., and John Shannon, Esq. representing Alvarado.
12 During the meet and confer counsel discussed the topics outlined in the correspondence enumerated
13 above. Alvarado's counsel asserted their position that Alvarado did not put his health in issue in this
14 litigation because this a breach of contract/bad faith case, unlike the underling negligence case
15 against the tortfeasors. Counsel then reasserted their position that Alvarado is not required to
16 provide a Rule 35 examination or the data from his prior vocational rehabilitation testing, as Acuity
17 had the opportunity to do this discovery in the underlying case and it did not do it.

18 According to Alvarado's counsel, Alvarado's submission to the requested discovery in this
19 case would be giving Acuity a "second bite at the apple." In response, Acuity's counsel pointed to
20 allegations in Alvarado's Complaint, which are cited herein, that put Alvarado's health and capacity
21 to work in controversy, thereby satisfying the good cause requirement for granting a motion to
22 compel a Rule 35 examination. Acuity's counsel also pointed out that Acuity is entitled to conduct
23 discovery in this case, which, unlike the underlying case, includes claims against Acuity, and that
24 this Court has found the same in other cases. Alvarado's counsel stated they reviewed the case law
25 Acuity provided (and, in fact, reviewed one case during the call), and they disagree with Acuity's
26 position.
27

28 However, all parties agreed that an extension in the current discovery deadlines is required

1 given the instant discovery dispute, which impacts the September 7, 2022 initial expert disclosure
 2 deadline, and the dispute over documents Acuity withheld on the ground of attorney-client
 3 privilege, which is the subject of a pending motion (ECF No. 23, Pl.’s Mot. for Ord. Compelling
 4 Critical Claim Evaluation Docs. Acuity Withheld). A stipulation will be provided for the Court’s
 5 approval shortly.

6 III. LEGAL ARGUMENT

7 A. Legal Authority: Compelling Rule 35 Examination of a Party

8 Rule 35 allows the court where the action is pending, upon a motion and for good cause, “to
 9 order a party whose mental or physical condition is in controversy to submit to a physical or mental
 10 examination by a suitably licensed examiner.” Fed. R. Civ. P. 35(a)(1)-(2)(A). Where, as here, the
 11 plaintiff puts his physical injury in controversy, the pleadings alone may suffice to meet Rule 35’s
 12 good cause and controversy requirements. *See Schlagenhauf v. Holder*, 379 U.S. 104, 119, 85 S.
 13 Ct. 234, 243 (1964); *see also Buononato v. Sam’s W., Inc.*, No. 219CV01221RFBNJK, 2020 WL
 14 10147129, at *2 (D. Nev. Nov. 18, 2020)(Mag. N. Koppe)(quoting *Schlagenhauf*, *supra*, and
 15 explaining the plaintiff put his physical injury in question by alleging in his complaint that “he
 16 suffered injuries requiring medical attention because of Defendant’s negligence”). Rule 35
 17 examinations are particularly necessary in cases like this one, where the plaintiff is alleging
 18 substantial and continuing damages resulting from his physical injuries. *Victor v. Walmart, Inc.*,
 19 Defendant., No. 220CV01591JCMNJK, 2021 WL 3745190, at *3 (D. Nev. Apr. 8,
 20 2021)(explaining “Plaintiff alleges that her future medical specials are \$295,065. Docket No. 18-2
 21 at 6. Denying the motion for extension would preclude Defendant from pursuing a Fed. R. Civ. P.
 22 35 examination and challenging allegations at the heart of the instant complaint.”).

24 As this Court has explained “[d]efendants have the right to perform their own assessment,
 25 because one of the purposes of Rule 35 is to level the playing field in cases where physical or
 26 mental condition is at issue, because ‘[a] plaintiff has ample opportunity for psychiatric or mental
 27 examination by his/her own practitioner or forensic expert.’” *Painter v. Atwood*, No.
 28 2:12-CV-01215-JCM, 2013 WL 5428059, at *2 (D. Nev. Sept. 26, 2013)(Mag. N. Koppe)(citing

1 *Ashley v. City & Cnty. of San Francisco*, 2013 WL 2386655 (N.D.Cal. May 30, 2013), citing *Ragge*
 2 *v. MCA/Universal Studios*, 165 F.R.D. 605, 608 (C.D.Cal.1995)).

3 The trial court has broad discretion in setting the terms and conditions of a Rule 35
 4 examination. *See, e.g., Blount v. Wake Elec. Membership Corp.*, 162 F.R.D. 102, 107 (E.D.N.C.
 5 1993). However, “[a]s a general rule, the moving party is permitted to select the physician who will
 6 conduct the Rule 35 examination.” *Pham v. Wal-Mart Stores, Inc.*, 2012 WL 1957987, at *3 (D.
 7 Nev. May 29, 2012). “Though commonly referred to as an ‘independent medical examination’
 8 (IME), there is nothing in the rule requiring the examiner to be ‘independent’ or unconnected to an
 9 adverse party.” *Hernandez v. Vanveen*, 2015 WL 2165556, at *2 (D. Nev. May 8, 2015). Often Rule
 10 35 examinations arise “in the context of developing expert testimony for trial with the expert
 11 witnesses then subject to the discovery obligations of Rule 26 and 30. It is often, though not always,
 12 the case that a Rule 35 examiner also serves as a Rule 26 expert.” *Kolas v. Wal-Mart Stores Inc.*,
 13 No. 217CV01597APGNJK, 2018 WL 2271220, at *1 (D. Nev. Jan. 4, 2018)(quoting *id.*)(internal
 14 quotations and citations omitted).

15
 16 In the Ninth Circuit, “Rule 35 does not require the party requesting an examination to fully
 17 describe the manner and conditions of the examination.” *Buononato v. Sam's W., Inc.*, No.
 18 219CV01221RFBNJK, 2020 WL 10147129, at *2 (D. Nev. Nov. 18, 2020)(Mag. N. Koppe)(citing
 19 *Azevedo v. City of Fresno*, 2009 WL 5216877, at *3 (E.D. Cal. Dec. 30, 2019) (finding Rule 35
 20 “does not require the moving party to describe the particular testing/procedures or the examiner's
 21 background”) (citing *Kob v. Cty. of Marin*, 2009 WL 3706820, at *1 (N.D. Cal. Nov. 3, 2009)).

22 Alvarado, as “[t]he party seeking to avoid discovery bears the burden of showing why the
 23 discovery should not be permitted.” *V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 306, 309 (D. Nev. 2019);
 24 *see also Bible v. Rio Properties, Inc.*, 246 F.R.D. 614, 618 (C.D.Cal.2010) (citing *Blankenship v.*
 25 *Hearst Corp.*, 519 F.2d 418, 429 (9th Cir.1975) (explaining the party resisting discovery has the
 26 burden of showing the discovery sought is unduly burdensome or oppressive)).

27 ///

28 ///

B. Plaintiff Put his Physical Condition and Ability to Work in Controversy; Thus, There is Good Cause to Order Him to Submit to a Rule 35 Examination.

Contrary to Alvarado’s contention, whether his claims for relief in this case sound in negligence, in contract, or whether they are extra-contractual in nature is immaterial to whether he put his physical health and capacity to work in controversy. *See, e.g., Starkey v. McHugh*, No. 14-CV-02525-PSG, 2015 WL 6438762, at *3 (N.D. Cal. Oct. 23, 2015)(finding the plaintiff in a harassment case must submit to a Rule 35 examination by a vocational rehabilitation expert because she put her ability to work in issue); *Rance v. Jefferson Vill. Condo. No. 5*, No. 18 CIV. 6923 (JCM), 2019 WL 12373336, at *3 (S.D.N.Y. Sept. 23, 2019)(finding plaintiff put her mental health in issue in FHA discrimination case). As with a negligence claim, prevailing on his breach of contract and extra-contractual claims requires Alvarado to prove his damages. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Fitts*, 120 Nev. 707, 710, 99 P.3d 1160, 1162 (2004)(explaining "first-party UM/UIM contractual benefits are based upon damages sustained in tort at the hands of a third-party driver"); *see also Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 796, 858 P.2d 380, 384 (1993)(explaining proving bad faith requires a plaintiff to establish “legal entitlement,” which has been interpreted to mean that the “insured must be able to establish fault on the part of the uninsured motorist which gives rise to the damages and to prove the extent of those damages”)(internal quotations omitted).

Alvarado’s Complaint alleges he incurred and will continue to incur damages as a result of his injuries from the subject accident, including “invasive surgical procedures and associated medical expenses; past lost wages, loss of future earnings and earning capacity; loss of household services; and other incidental expenses and damages; with said past and future general and special damages in an amount in excess of SEVEN MILLION DOLLARS (\$7,000,000.00).” (ECF No. 1-2, Pl.’s Compl., at ¶ 10, 3:17-26.). Alvarado’s Initial Disclosure states these damages specifically include \$120,000 in past lost wages and \$369,728.00 in future lost earning capacity. His Complaint confirms these damages form the basis of his breach of contract claim seeking underinsured motorist (“UIM”) benefits and his bad faith claim (which requires a showing of legal entitlement).

(*Id.*, at ¶¶ 15, 101-103, 123.) Therefore, the pleadings in this case satisfy Rule 35's controversy and good cause requirements under Rule 35.

Alvarado's contention that Acuity is bound and limited by the discovery it did or did not do in the underlying case lacks any legal support whatsoever. Ninth Circuit courts have found a defendant is entitled to a Rule 35 examination of a plaintiff, when the plaintiff put his or her health in issue even when such an examination was performed in an underlying case. *See, e.g., Vario v. First Nat'l Ins. Co.*, No. C16-1900RSM, 2017 WL 3172825, at *3 (W.D. Wash. July 26, 2017)(rejecting plaintiff's argument that the defendant was not entitled to Rule 35 examination because plaintiff submitted to one in the underlying case). Allowing a Rule 35 examination in a subsequent case makes sense, as substantial time may have passed between the two cases, and the plaintiff may be in a different place in his or her recovery, and may not suffer from the same limitations he or she suffered from during the time frame of the underlying case. *Id.*, at *2 (explaining good cause exists to allow a Rule 35 examination "that addresses the current condition and future medical prognosis of [plaintiff's] physical injuries" and noting a continuing injury is one of the factors to consider in assessing whether good cause exists).

However, here, the only Rule 35 examination that ever took place was that which Alvarado's own vocation rehabilitation expert, Carol Hyland, performed. Ms. Hyland, who Alvarado disclosed as an expert in this case, opines Alvarado will be unable to return to his prior vocation, which will limit his future earning capacity. (Exhibit B, Pl.'s Init.'l Discs., at 19:12-13, listing Carol Hyland, M.A., M.S., C.L.C.P., C.D.M.S.'s Expert Report, Dated February 17, 2020; Exhibit C, Report C. Hyland, at pp. 8-9, Bates Nos. Plt 02022-23.)

Fairness dictates that Acuity receive the same opportunity for a Rule 35 examination that Alvarado availed himself of. *See Painter v. Atwood*, No. 2:12-CV-01215-JCM, 2013 WL 5428059, at *2 (D. Nev. Sept. 26, 2013)(Mag. N. Koppe)(explaining Rule 35 examinations level the playing field in cases where physical or mental condition is at issue, because "[a] plaintiff has ample opportunity for psychiatric or mental examination by his/her own practitioner or forensic expert."); *see also Bridgham-Morrison v. Nat'l Gen. Assurance Co.*, Case No. C15-927RAJ, 2016

1 WL 231284, at *4 (W.D. Wash. Jan. 19, 2016) (explaining whether plaintiff plans to prove his
 2 claim through expert witness testimony is a factor in determining whether good cause exists)(citing
 3 Lopez v. City of Imperial, No. CIV. 13-0597-BEN WVG, 2014 WL 232271, at *3–4 (S.D. Cal. Jan.
 4 21, 2014)). Indeed, Acuity would be substantially prejudiced at trial should this Court decline to
 5 order Alvarado submit to a Rule 35 examination by Acuity’s expert, as there would be no way to
 6 rebut Alvarado’s expert’s opinions. Thus, the requested relief is necessary to level the playing field
 7 in this case. *Ragge v. MCA/Universal Studios*, 165 F.R.D. 605, 608 (C.D. Cal. 1995)(explaining
 8 one purpose of Rule 35 is to “‘level the playing field’ between parties in cases in which a party’s
 9 physical or mental condition is in issue.”).

10 Part and parcel of that leveling is enabling Acuity’s expert to interpret the raw data from the
 11 tests Ms. Hyland performed so that he can assess her methodology as it relates to her conclusions.
 12 Alvarado has no grounds to contest the disclosure of this raw data to Mr. Taylor (not defense
 13 counsel), as it forms the basis of Ms. Hyland’s opinions, and Rule 26(a)(2)(B)(ii) requires the
 14 production of “the facts or data” the expert considered in forming her opinions. *See Starkey*, No.
 15 14-CV-02525-PSG, 2015 WL 6438762, at *2 (ordering the disclosure of raw data from Rule 35
 16 examination)(citing *Hirschheimer v. Associated Metals & Minerals Corp.*, Case No. 94-cv-06155,
 17 1995 WL 736901, at *5 (S.D.N.Y. Dec. 12, 1995). Therefore, Acuity additionally requests this
 18 Court order Ms. Hyland to transmit the data from the tests she performed on Alvarado to Acuity’s
 19 expert, Mr. Taylor, so that Mr. Taylor can evaluate the test data himself and assess Ms. Hyland’s
 20 methodology and conclusions.

22 Finally, Acuity has provided Alvarado with the parameters of the examination, including
 23 the examiner’s identity, the time frame required by the interview and the test administration, and
 24 the location (the interview via Zoom and the test via internet). Alvarado has not complained about
 25 either the examiner or the parameters and modes of the interview or the test to be administrated. In
 26 fact, Alvarado’s own counsel has reportedly worked with Mr. Taylor on numerous occasions, and
 27 is well acquainted with him. Nevertheless, Mr. Taylor’s curriculum vitae and list of expert witness
 28 testimony, which demonstrates his qualification as an expert, are attached hereto. (**Exhibit H**, CV

1 and list of expert witness testimony of R. Taylor.) Acuity requests this Court require Alvarado to
2 submit to the testing on one of the two dates provided in the Conclusion section below, so that this
3 Court may provide the date in the Order compelling the examination as Rule 35 requires.

4 **IV. CONCLUSION**

5 For the reasons above, Defendant Acuity A Mutual Insurance Company respectfully requests
6 this Court grant its Motion To Compel Rule 35 Examination of Plaintiff Estevan Alvarado-Herrera,
7 and enter an order requiring:

- 8 1. Alvarado to attend a Rule 35 examination to be conducted by Acuity's vocational
9 rehabilitation expert Robert Taylor, to be conducted one of the following dates that
10 Alvarado is available, with the Zoom interview to last approximately 2 hours, and, if
11 deemed necessary, approximately 2.5 hours of vocational testing to be administered online
12 to follow:
- 13 a. Thursday September 27, 2022, at 9:00 am PST; or
14 b. Thursday September 30, at 9:00 am PST.
- 15 2. Alvarado's expert, Ms. Hyland, to transmit to Mr. Taylor for his examination and
16 interpretation the raw data from the tests Ms. Hyland administered to Alvarado.

17 DATED this 7th day of September, 2022.

18 THE FELDMAN FIRM

19
20 By /s/ David Feldman
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CERTIFICATE OF SERVICE

I hereby certify that I am employee of The Feldman Firm, and that on the 7th day of September, 2022, I served the above and foregoing **DEFENDANT ACUITY A MUTUAL INSURANCE COMPANY'S MOTION TO COMPEL RULE 35 EXAMINATION OF PLAINTIFF AND PRODUCTION OF RAW DATA FROM PRIOR EXAMINATION** on the following parties in compliance with the Nevada Electronic Filing and Conversion Rules:

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